Filed 10/1/15 In re Abel G. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re ABEL G., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ABEL G., Defendant and Appellant.	G050765 (Super. Ct. No. DL042513) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]

The opinion filed in this case on September 11, 2015, is ordered modified as follows:

1. On page 6, the following is added at the beginning of the first full paragraph beginning with "One means sufficiently distinguishable":

Minor contends there are no intervening events that took place subsequent to his initial unlawful detention that could attenuate the taint of the unlawful detention. He is wrong.

2. On page 6, insert the following paragraph immediately following the first full paragraph:

Although the complete details of the threat were not brought out, the issue is not whether the evidence would have been sufficient to support a conviction for violating section 422. The issue is whether the facts known to the officer support a reasonable suspicion the minor violated the law. (*People v. Miranda* (1993) 17 Cal.App.4th 917, 926.) After all, the purpose of a detention is to permit the officer to briefly further investigate whether a violation occurred. (*People v. Brown* (2015) 61 Cal.4th 968, 986.) Of course, the making a threat to kill a police officer by one who is in custody does not mean there was no violation of section 422. (*People v. Wilson* (2010) 186 Cal.App.4th 789, 815, 819 [imprisoned defendant's threat to kill an officer upon being released from custody was sufficient to sustain a conviction for making a criminal threat].)

This modification does not change the judgment. The petition for rehearing is DENIED.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.

Filed 9/11/15 In re Abel G. CA4/3 (unmodified version)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re ABEL G., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ABEL G., Defendant and Appellant.	G050765 (Super. Ct. No. DL042513) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lewis W. Clapp, Judge. Affirmed.

Steven A. Brody, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Collette C. Cavalier and Kristen Hernandez, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

On August 26, 2014, the district attorney filed a petition in juvenile court alleging the minor in this matter committed felony vandalism (Pen. Code, § 594, subds. (a), (b)(1); all undesignated statutory references are to the Penal Code), misdemeanor assault on a police officer (§ 243, subd. (b)), and resisted and obstructed a police officer in the performance of his duties (§ 148, subd. (a)(1)), also a misdemeanor. After considering all the evidence at trial, the juvenile court found the minor committed the vandalism, assault, and resisted or obstructed a police officer in the performance of his duties. The court found the vandalism to have been a misdemeanor because there was no testimony supporting a conclusion the damage was over $400, as required by the statute. (See § 594, subd. (b)(1).)

Minor contends the evidence does not support his conviction for violating section 148, subdivision (a)(1). He asserts that his initial detention was unlawful, making his arrest unlawful. He concludes that the officer was not in the performance of his lawful duties when minor resisted the officer's efforts to put him in the backseat of the squad car. Alternatively, he argues defense counsel was ineffective for failing to object to evidence relating to the issue of minor's detention. We find the act that gave rise to probable cause for minor's arrest—which occurred during minor's detention—was the result of an independent act of free will on minor's part and purged the primary taint of any unlawful detention. Accordingly, we conclude the evidence supports the judgment and counsel was not ineffective.

I

FACTS

Because minor does not challenge the juvenile court's findings regarding the battery and vandalism charges, we omit the facts relating to those offenses and set forth only those facts concerning the violation of section 148, subdivision (a)(1). On August 22, 2014, at 9:15 p.m., Officer Sean Guarino and other officers of the Anaheim Police Department were dispatched to a report of a fight in the alley behind an address on

South Sprague Lane. Guarino drove his black and white squad car into the south end of the alley behind Sprague Lane. He saw four males in the alley. Two males saw the squad car and ran. One of males who fled, ran north in the alley. Guarino accelerated north, to the location of the two males who did not flee. He decided not to pursue the male who fled to the north.

Two officers on bicycles were on the same call and went to the front of the address to which they had been dispatched. When Guarino stopped his squad car in the alley, he saw the other officers had detained minor. The officers were unable to determine whether there had been a fight.

Within five minutes of minor's detention, Guarino, noticed minor appeared to be intoxicated; had the odor of an alcoholic beverage coming from his breath and person; his eyes were "red, bloodshot, and watery"; his gait was unsteady; and he was "very aggressive and belligerent" toward the officers. Minor swore at the officers and threatened one of them, saying he would kill the officer. Guarino decided to detain minor for being a minor under the influence of alcohol and drunk in public.

One of the other officers handcuffed minor and it was decided to place him in the backseat of Guarino's squad car. Minor did not cooperate with being placed in the squad car. He refused to sit down in the backseat. When Guarino attempted to get him to sit down, minor stiffened his body, becoming very rigid, and requiring Guarino to use force to get him to sit down. Minor continued to yell and swear at the officers.

After minor was placed in the police car, Guarino ran a computer check on minor and learned minor was on probation. He called minor's probation officer and the probation officer directed Guarino to take minor to juvenile hall.

II

DISCUSSION

Minor argues the evidence is insufficient to sustain the finding that he violated section 148, subdivision (a)(1). In reviewing whether the evidence supports the

true finding, we "review[] the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable" fact finder could find beyond a reasonable doubt the accused violated the charged statute. (*People v. Rountree* (2013) 56 Cal.4th 823, 852-853.) We "presume[] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) If such evidence is found to exist, it does not matter that the evidence could also be consistent with innocence. (*People v. Farris* (1977) 66 Cal.App.3d 376, 383.)

"Every person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment, . . . shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment." (§ 148, subd. (a)(1).) The prohibited resistance is "resistance of an officer in the discharge or attempted discharge of *any* duty of his or her office." (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 894.) The elements of a violation of section 148, subdivision (a)(1) are: "'(1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the [lawful] performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties. [Citations.]' [Citation.]" (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 759; see *Yount v. City of Sacramento*, *supra*, 43 Cal.4th at p. 894 [section 148 requires the officer to have been "*lawfully* engaged in the performance of his or her duties"].) A detention made without a reasonable suspicion of illegal activity is unlawful (*People v. Pitts* (2004) 117 Cal.App.4th 881, 889), as is an arrest without probable cause (*People v. Olguin* (1981) 119 Cal.App.3d 39, 45).

Minor contends there is no evidence his detention was lawful. At trial, he argued flight does not authorize the police to detain an individual, and there was no

evidence he was one of the two individuals who ran from the police. From there, he reasons the evidence does not establish Guarino was in the lawful performance of his duty when minor purportedly delayed or obstructed the officer by resisting the officer's attempt to place him in the police car.

Although unprovoked flight at the sight of police can give rise to a reasonable suspicion to stop and detain the fleeing individual (*Illinois v. Wardlow* (2000) 528 U.S. 119, 125-126), there was no evidence minor was the person who fled. Guarino, the officer who saw an individual flee upon his arrival on the scene, could not identify minor as the person who fled. Additionally, the bicycle officers who initially detained minor did not testify. For all we know, minor was detained prior to Guarino seeing an individual flee from the alley. For purposes of our discussion, we will assume minor's initial detention was not supported by a reasonable suspicion and was, therefore, unlawful. (*Alabama v. White* (1990) 496 U.S. 325, 328 [detention must be supported by reasonable suspicion defendant was involved in criminal activity].)

A charge of violating of section 148, subdivision (a)(1), cannot be found true if the officer was acting in violation of the Fourth Amendment. The reason is that the officer must have been in the performance of his *lawful* duties at the time of the accused's action, and an officer is not in the performance of his lawful duties while acting in violation of the Fourth Amendment. (See *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 ["an officer has no duty to take illegal action"].)

If Guarino's attempt to place minor in the rear of the police vehicle was only supported by Guarino's observation of minor's symptoms of intoxication, Guarino would not have been acting lawfully. If a defendant is detained in violation of the Fourth Amendment, an act of the police that exploits the unlawful detention is a continuation of the Fourth Amendment violation, such that the act is not done in the performance of a lawful duty. (See *Wong Sun v. United States* (1963) 371 U.S. 471, 484 ["'fruits'" of Fourth Amendment violation are not lawfully obtained].) Ordinarily, when an individual

has been unlawfully detained and during the unlawful detention, an officer makes observations that would provide a reason to further detain or arrest the individual, the observations are deemed to have come through exploitation of the initial unlawful detention and are suppressed. (*United States v. Crews* (1980) 445 U.S. 463, 470.) The test for determining whether the police exploited an unlawful detention—i.e., the officer acted unlawfully and not in the performance of his lawful duty—is "'"whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." [Citation.]' [Citation.]" (*Brown v. Illinois* (1975) 422 U.S. 590, 599.)

One means sufficiently distinguishable to purge the primary taint of the initial unlawfulness of a detention occurs when a complained of act is the result of the accused's "'"intervening independent act of free will."'" (See *Brown v. Illinois*, *supra*, 422 U.S. at p. 598.) Here, defendant's threat to kill one of the bicycle officers who initially detained him qualifies as an intervening independent act of free will and "'purge[d] the primary taint'" of the unlawful detention. (*Ibid*.) Were the rule otherwise, *any* observation during an unlawful detention would be deemed the fruit of the unlawful detention, providing one unlawfully detained with carte blanche to commit new crimes during an unlawful detention.

We note that Guarino stated he decided to place the minor in the backseat of the police vehicle because it appeared minor was drunk in public (see § 647, subd. (f)). The fact that the officer relied upon a violation of law other than the making of a criminal threat against one of the bicycle officers (§ 422),[1] does not change the result. "'[T]he fact

[1] "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional,

that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'" (*Whren v. United States* (1996) 517 U.S. 806, 813.) In other words, "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." (*Ibid.*)

To sum up, even were we to assume minor's initial detention was unlawful, his subsequent threat to kill one of the detaining officers—an act of minor's free will—purged the taint of the initial unlawful detention. The threat was an independent act that justified Guarino's continued detention of minor and the placing of minor in the backseat of the police vehicle. Consequently, Guarino was acting within the performance of his lawful duty when he attempted to place minor in the backseat of the police vehicle and defendant's resistance supported the juvenile court's conclusion that defendant resisted or delayed a police officer in the performance of his lawful duty.

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immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison." (§ 422, subd. (a).)

III

DISPOSTION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.